

AMENDED IN ASSEMBLY APRIL 10, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1143**

**Introduced by Assembly Member Simitian**

February 21, 2003

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An act to add Chapter 4 (commencing with Section 2040) to Title 3 of Part 4 of the Code of Civil Procedure, relating to Internet communications.

LEGISLATIVE COUNSEL'S DIGEST

AB 1143, as amended, Simitian. Civil procedure: Internet communications.

Existing law establishes the procedures by which a party may seek to produce evidence in a civil action.

This bill would establish the Internet Communications Protection Act, governing civil proceedings in which a party requests a subpoena seeking identifying information from an Internet provider or community host. The bill would require a ~~person~~ *party* seeking identifying information about an Internet user to file a copy of the subpoena, along with specified supporting documents, with the court. The bill would set forth the subpoena procedures a party is required to follow for serving the Internet service provider, and the procedures the Internet provider must follow in responding to a subpoena. The bill would also establish remedies, including *the award of* attorney's fees and costs and ~~unspecified~~ statutory damages, for violations of the act and would enact other related provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. This act shall be known as, and may be cited as, the Internet Communication Protection Act of 2003.

SEC. 2. Chapter 4 (commencing with Section 2040) is added to Title 3 of Part 4 of the Code of Civil Procedure, to read:

CHAPTER 4. IDENTITY OF INTERNET USERS

2040. For the purposes of this chapter, the following definitions apply:

(a) "Identifying information" includes the following information regarding an Internet user:

(1) A first or last name.

(2) A pseudonym.

(3) A home or other physical address, including street name or name of a city or town.

(4) An e-mail address.

(5) A telephone number.

(6) A social security number.

(7) *A birthdate.*

(8) *An Internet protocol (IP) address.*

(9) Any other identifier *or combination of information* that permits the physical or online contacting of a specific individual.

(b) "Internet service provider" means a provider of online services or the operator of online service facilities.

(c) "Community host" means the owner, moderator, or operator of an ~~online bulletin board, online newsgroup, or other~~ online discussion forum.

(d) "Internet user" means an individual who subscribes to or uses the online services or facilities of an Internet service provider or the forum of a community host.

(e) *"Online discussion forum" means an online bulletin board, online newsgroup, chat room, Internet Relay Channel, message board, listserv, discussion board, or other online discussion forum.*

(f) *"Public posting" is a message or comment sent, posted, or contributed to an online discussion forum and made available through the online discussion forum to the general public or a segment of the general public.*

2041. The following procedure governs civil proceedings in which a party requests a subpoena seeking identifying information from an Internet service provider or community host:

(a) ~~Any subpoena seeking identifying information about an Internet user shall allow no less than 40 days for compliance by the subpoenaed party.~~

(b) Prior to serving the subpoena, a party seeking identifying information about an Internet user shall file with the court a complete copy of the subpoena and all items annexed or incorporated therein, along with the following supporting materials:

(1) Evidence supporting each element of the cause of action, which may include proof of economic harm *or any proof of ownership of the underlying property rights, whether tangible or not tangible.*

(2) A statement *under oath, with supporting factual grounds* establishing all of the following:

(A) That the subpoenaing party's claim can withstand a motion to dismiss for failure to state a claim upon which relief can be granted.

(B) Why the identity of the Internet user is directly and materially relevant to a core claim or defense.

(C) That other reasonable efforts to identify the anonymous communicator have proven fruitless.

(D) *That the subpoena is issued in good faith and not for any improper purpose.*

(E) That the individuals or entities to whom the subpoena is addressed are likely to have responsive information.

~~(b)~~

(F) *That the court, if any process relating to this subpoena has been filed, has personal and subject matter jurisdiction over the subpoenaing party and over all defendants.*

(3) *The name of the court in which any process relating to this subpoena has been filed and the corresponding case number.*

(c) After filing the subpoena and supporting materials with the court, the subpoenaing party shall, at least ~~35~~ 40 days before the date of disclosure, serve two copies of each of all of the following:

(1) The subpoena.

(2) The supporting materials described in paragraphs (1) and ~~(2)~~ (3) of subdivision (a).

(3) The required notices described in subdivision ~~(h)~~ (j), upon the Internet service provider or community host along with ~~sufficient~~ payment *sufficient* to cover postage for the Internet service provider or community host to mail one copy of the served materials to the Internet user, via ~~international~~ *first-class* mail, return receipt requested, *and the amount set for reimbursement pursuant to Section 2041.5.*

~~(e)~~

(d) Within ~~five~~ 10 days after receipt of a subpoena and supporting materials calling for disclosure of identifying information or a written objection, motion to quash, or motion for a protective order in response to the subpoena from a party other than the Internet user, the Internet service provider or community host shall provide notice as follows:

(1) If a mailing address is on file with the Internet service provider or community host, one copy of the materials described in subdivision ~~(a)~~ (b) shall be dispatched by registered mail or commercial delivery service, return receipt requested, to the Internet user.

(2) If an e-mail address is on file with the Internet service provider or community host, an e-mail shall be sent to the Internet user stating that the subpoena or the written objection, motion to quash, or motion for a protective order has been received.

(3) ~~If When the claim advanced by the plaintiff relates to an online bulletin board a public posting on an online discussion forum by the Internet user whose information is sought, and, the Internet service provider or community host shall post notice on the online bulletin board where the posting has been made stating that the subpoena or the written objection, motion to quash, or motion for a protective order has been received, if any of the following if the following~~ conditions are satisfied:

(A) Neither the e-mail address nor mailing address is on file.

(B) The Internet service provider or community host receives notice that both the onfile e-mail and on file mailing address are incorrect or out-of-date, such as via a returned mailing or bounced e-mail.

(C) The Internet service provider or community host receives notice that the onfile e-mail address is incorrect or out-of-date, such as via a bounced e-mail, and the mailing address is not on file.

(D) The Internet service provider or community host receives notice that the onfile mailing address is incorrect or out-of-date, such as via a returned mailing, and the e-mail address is not on file. *If this occurs, then the Internet service provider, at its discretion, may either:*

*(i) Post a message on the online bulletin board where the posting has been made stating that the subpoena or the written objection, motion to quash, or motion for a protective order has been received.*

*(ii) Notify the subpoenaing party that the conditions contained in paragraph (3) have been satisfied.*

*If the Internet service provider chooses to notify the subpoenaing party, then the time limit for the subpoena shall be extended automatically to no less than 25 days after the online posting has been effected.*

(4) The Internet service provider or community host has no responsibility to research the e-mail or mailing address of the Internet user if either is not on file or if either is incorrect or out-of-date.

~~(d)~~

*(5) This chapter does not reduce or limit any requirement of law that prohibits an Internet service provider or community host from destroying any identifying information after receipt of the subpoena until the identifying information is disclosed to the subpoenaing party or until the court determines whether that identifying information should be disclosed to the subpoenaing party.*

*(e) The Internet service provider or community host to whom the subpoena is addressed may not release the information requested by the subpoena in either of the following cases:*

*(1) Where a written objection, motion to quash, or motion for a protective order has been filed in accordance with subdivision ~~(e)~~ (f).*

*(2) Where the subpoenaing party has not complied with subdivision (a) ~~or (b)~~, (b), or (c).*

~~(e) At least five days~~

*(f) At any time prior to the date of disclosure as stated on the subpoena, any interested person or entity may file a written objection, motion to quash, or motion for a protective order, pursuant to Section 1987.1 of the Code of Civil Procedure.*

1 (1) Copies of any of the papers filed by the Internet user shall  
2 be served on or before the date of filing upon the party seeking the  
3 subpoena and the Internet service provider or community host.

4 (2) Copies of any of the papers filed by the Internet service  
5 provider or community host shall be served on or before the date  
6 of filing upon the party seeking the subpoena and the Internet user  
7 whose subscriber identifying information is sought.

8 (3) A copy of any of the papers filed by any other interested  
9 ~~party~~ *person or entity* shall be served on the subpoenaing party on  
10 or before the date of filing. Two copies of those papers, including  
11 payment sufficient to cover postage for the Internet service  
12 provider or community host to mail one copy of the served  
13 materials to the Internet user, via domestic registered mail, return  
14 receipt requested shall be served upon the Internet service provider  
15 or community host. The Internet service provider or community  
16 host shall provide notice of those papers to the Internet user  
17 through the procedure described in subdivision ~~(e)~~ (d).

18 (4) For service pursuant to paragraphs (1) to (3), inclusive,  
19 service is effective upon dispatch.

20 ~~(f)~~

21 (g) Any written objection, motion to quash, or motion for a  
22 protective order shall set forth all of the grounds relied upon for  
23 denying the disclosure sought in the subpoena and shall also  
24 address, to the extent feasible, the following:

25 (1) Whether the subpoena fails to allow a reasonable time for  
26 compliance.

27 (2) Whether the subpoena complies with the requirements of  
28 subdivision ~~(a)~~ (b).

29 ~~(g)~~

30 (h) When considering a written objection, motion to quash, or  
31 motion for a protective order, the court shall examine whether the  
32 subpoenaing party and the Internet service provider or community  
33 host have substantially complied with the requirements set forth  
34 in this chapter and all of the following factors:

35 (1) The defendant's First Amendment right of anonymous free  
36 speech.

37 (2) The strength of the case presented in the supplemental  
38 materials listed in subdivision ~~(a)~~ (b).

39 (3) The necessity for disclosure of the Internet user's identity.

1 If the court determines that these elements weigh in favor of the  
2 Internet user, the court shall quash the subpoena.

3 ~~(h)~~

4 (i) *This section does not apply to civil law enforcement actions*  
5 *brought by the Attorney General or a district attorney, or to*  
6 *investigations pursuant to Section 11180 of the Government Code.*

7 (j) The party requesting a subpoena for identifying information  
8 shall serve, along with each copy of the subpoena to the Internet  
9 service provider or community host, a copy of this chapter of the  
10 California Code of Civil Procedure and notices in boldface capital  
11 letters in substantially the following form:

12  
13 “(1) NOTICE TO INTERNET SERVICE PROVIDER OR  
14 COMMUNITY HOST

15  
16 WITHIN FIVE DAYS AFTER RECEIPT OF THIS SUBPOENA  
17 CALLING FOR IDENTIFYING INFORMATION OF AN  
18 INTERNET USER, YOU ARE REQUIRED BY SECTION 2041  
19 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE TO  
20 MAIL ONE COPY OF THE SUBPOENA AND ATTACHED  
21 SUPPLEMENTAL MATERIALS, BY REGISTERED MAIL,  
22 RETURN RECEIPT REQUESTED, TO THE INTERNET USER  
23 WHOSE IDENTIFYING INFORMATION IS THE SUBJECT  
24 OF THE SUBPOENA, IF YOU HAVE THE INTERNET  
25 USER’S MAILING ADDRESS ON FILE. A COPY OF THE  
26 SUBPOENA AND SUPPLEMENTAL MATERIALS IS  
27 PROVIDED, ALONG WITH PAYMENT FOR POSTAGE. YOU  
28 MUST ALSO NOTIFY THE INTERNET USER VIA E-MAIL,  
29 IF YOU HAVE THE INTERNET USER’S E-MAIL ADDRESS  
30 ON FILE. IF NEITHER MAILING NOR E-MAIL ADDRESS IS  
31 ON FILE FOR THE INTERNET USER, YOU MAY BE  
32 REQUIRED BY THIS STATUTE TO POST A NOTICE ON AN  
33 ONLINE BULLETIN BOARD.

34  
35 ~~AT FIVE DAYS~~ ANY TIME PRIOR TO THE DATE ON WHICH  
36 DISCLOSURE IS SOUGHT YOU MAY, BUT ARE NOT  
37 REQUIRED TO, FILE A WRITTEN OBJECTION, MOTION  
38 TO QUASH, OR MOTION FOR A PROTECTIVE ORDER.

39  
40 COPIES OF ANY OBJECTION OR MOTION SHALL BE



1 SERVED UPON THE PARTY INITIATING THE SUBPOENA  
2 AND UPON THE INTERNET USER WHOSE IDENTIFYING  
3 INFORMATION IS SOUGHT.

4  
5 IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA,  
6 YOU MUST ALLOW TIME FOR THE INTERNET USER TO  
7 FILE HIS OR HER OWN OBJECTION. THEREFORE, YOU  
8 MUST NOT RESPOND TO THE SUBPOENA ANY EARLIER  
9 THAN THE DATE ON WHICH DISCLOSURE IS DUE, *AND*  
10 *IN NO EVENT SOONER THAN 40 DAYS AFTER THE*  
11 *SUBPOENA WAS PROPERLY SERVED UPON YOU.*

12  
13 IF YOU RECEIVE NOTICE THAT THE INTERNET USER OR  
14 ANOTHER INTERESTED PARTY HAS FILED A WRITTEN  
15 OBJECTION, MOTION TO QUASH, OR MOTION FOR A  
16 PROTECTIVE ORDER REGARDING THIS SUBPOENA, OR  
17 IF YOU FILE A WRITTEN OBJECTION, MOTION TO  
18 QUASH, OR MOTION FOR A PROTECTIVE ORDER,  
19 DISCLOSURE PURSUANT TO THE SUBPOENA MAY NOT  
20 BE MADE EXCEPT PURSUANT TO AN ORDER OF THE  
21 COURT ON BEHALF OF WHICH THE SUBPOENA WAS  
22 ISSUED.

23  
24 (2) NOTICE TO INTERNET USER

25  
26 THE ATTACHED PAPERS MEAN THAT (INSERT NAME OF  
27 SUBPOENAING PARTY) ~~HAS ASKED THE COURT TO~~  
28 ~~ISSUE~~ *ISSUED* A SUBPOENA *ON* (INSERT NAME OF  
29 INTERNET SERVICE PROVIDER OR COMMUNITY HOST)  
30 REQUIRING PRODUCTION OF INFORMATION  
31 REGARDING YOUR IDENTITY. UNLESS A WRITTEN  
32 OBJECTION, MOTION TO QUASH, OR MOTION FOR A  
33 PROTECTIVE ORDER IS FILED IN ACCORDANCE WITH  
34 SECTION 2041 OF THE CALIFORNIA CODE OF CIVIL  
35 PROCEDURE, THE INTERNET SERVICE PROVIDER *OR*  
36 *COMMUNITY HOST* WILL BE REQUIRED BY LAW TO  
37 RESPOND BY PROVIDING THE REQUIRED  
38 INFORMATION. IF YOU BELIEVE YOUR IDENTIFYING  
39 INFORMATION SHOULD NOT BE DISCLOSED, YOU HAVE  
40 THE RIGHT TO FILE A DETAILED WRITTEN OBJECTION,





1 MOTION TO QUASH THE SUBPOENA, OR MOTION FOR A  
2 PROTECTIVE ORDER.

3  
4 YOU MAY ELECT TO CONTACT AN ATTORNEY TO  
5 REPRESENT YOUR INTERESTS.

6  
7 IF YOU ELECT TO FILE A WRITTEN OBJECTION, MOTION  
8 TO QUASH, OR MOTION FOR A PROTECTIVE ORDER, IT  
9 SHOULD BE FILED AS SOON AS POSSIBLE, AND MUST IN  
10 ALL INSTANCES BE FILED BEFORE THE DATE ON WHICH  
11 DISCLOSURE IS DUE (LISTED IN THE SUBPOENA).

12  
13 IF YOU ELECT TO FILE A WRITTEN OBJECTION, MOTION  
14 TO QUASH, OR MOTION FOR A PROTECTIVE ORDER,  
15 YOU MUST AT THE SAME TIME SERVE A COPY OF THAT  
16 OBJECTION OR MOTION UPON BOTH YOUR INTERNET  
17 SERVICE PROVIDER OR COMMUNITY HOST AND  
18 SUBPOENAING PARTY. SERVICE IS EFFECTIVE UPON  
19 DISPATCH.

20  
21 IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN  
22 WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY  
23 FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR  
24 MOTION FOR A PROTECTIVE ORDER. YOU MAY USE THE  
25 FORM BELOW:

26  
27 (Name of Court Listed on Subpoena)

28  
29 (Name of Party Seeking Information)

30  
31 (Case No. \_\_\_\_)

32  
33 SAMPLE OBJECTION TO SUBPOENA DUCES TECUM

34  
35 I object to the Subpoena Duces Tecum addressed to \_\_\_\_ for the  
36 following reasons:

37  
38 (Set forth, in detail, all reasons why the subpoena should not be  
39 complied with, including the following: (1) whether the subpoena  
40 fails to allow a reasonable time for compliance, and (2) whether

1 the subpoena fails to comply with the requirements of subdivision  
2 (a) or (b).)

3  
4 (Name and address of Internet service provider or community  
5 host.)

6  
7 (Enter e-mail nickname, *pseudonym*, or other alias used in  
8 communicating via the Internet service provider or community  
9 host to whom the subpoena is addressed.)”

10  
11 2041.5. (a) *The Internet service provider or community host*  
12 *shall receive a fee for reimbursement from the subpoenaing party*  
13 *for costs as are reasonably necessary and which have been directly*  
14 *incurred in searching for, assembling, reproducing, or otherwise*  
15 *providing this information. These reimbursable costs shall include*  
16 *any costs due to necessary disruption of normal operations while*  
17 *complying with subdivision (d) of Section 2041 and shall include,*  
18 *but are not limited to, other expenses covered by Sections 1985 and*  
19 *2023 of the Code of Civil Procedure and Rule 45(c) of the Federal*  
20 *Rules of Civil Procedure.*

21 (b) *The amount of the fee provided by subdivision (a) shall be*  
22 *as mutually agreed by the subpoenaing party and the Internet*  
23 *service provider or community host, or, in the absence of*  
24 *agreement, shall be as determined by the court.*

25 2042. (a) A prevailing Internet user, Internet service provider  
26 or community host, or other interested party on a written objection,  
27 motion to quash, or motion for a protective order pursuant to this  
28 chapter shall be entitled to recover his or her attorney’s fees and  
29 costs.

30 ~~(b) An Internet user may bring a civil action pursuant to this~~  
31 ~~chapter against either or both the subpoenaing party and the~~  
32 ~~Internet service provider or community host in a California court~~  
33 ~~for damages caused by the release of identifying information by~~  
34 ~~the Internet service provider or community host that fails to~~  
35 ~~comply with this statute. A civil action under this section may not~~  
36 ~~be commenced later than one year after the date upon which the~~  
37 ~~claimant first has a reasonable opportunity to discover the~~  
38 ~~violation. The court may award the following to the Internet user:~~

39 ~~(1) Reasonable attorneys’ fees and other litigation costs~~  
40 ~~incurred.~~

1 ~~(2) Actual damages, including economic loss and emotional~~  
2 ~~damages.~~

3 ~~(3) Statutory damages, described as follows:~~

4 ~~(A) Minimum statutory damages of \_\_\_\_\_ dollars (\$\_\_\_\_\_) shall~~  
5 ~~be imposed upon the subpoenaing party for failure to comply with~~  
6 ~~subdivision (a) or (h) of Section 2041, leading to the release of~~  
7 ~~identifying information.~~

8 ~~(B) Minimum statutory damages of \_\_\_\_\_ dollars (\$\_\_\_\_\_) per~~  
9 ~~day shall be imposed for each day the Internet service provider or~~  
10 ~~community host is delayed, after five days from receiving the~~  
11 ~~subpoena, in providing notice to the Internet user, in violation of~~  
12 ~~subdivision (e) of Section 2041.~~

13 ~~(C) Minimum statutory damages of \_\_\_\_\_ shall be imposed on the~~  
14 ~~Internet service provider or community host for releasing~~  
15 ~~identifying information when a written objection, motion to~~  
16 ~~quash, or motion for a protective order is pending, in violation of~~  
17 ~~subdivision (d) of Section 2041.~~

18 ~~(e) For a repeat violation of the statute by any party a minimum~~  
19 ~~penalty of \_\_\_\_\_ dollars (\$\_\_\_\_\_) shall be imposed.~~

20 *(b) An Internet user may bring a civil action against the*  
21 *subpoenaing party in a court for damages caused by the release of*  
22 *identifying information by the Internet service provider or*  
23 *community host that fails to comply with this chapter. A civil action*  
24 *under this section may not be commenced later than one year after*  
25 *the date upon which the claimant has discovered the violation. The*  
26 *court may award the following to the Internet user:*

27 *(1) Actual attorneys' fees and other litigation costs incurred.*

28 *(2) Actual damages, including economic loss.*

29 *(3) Emotional damages.*

30 *(4) Statutory damages. Minimum statutory damages of five*  
31 *thousand dollars (\$5,000) shall be imposed upon the subpoenaing*  
32 *party for failure to comply with subdivisions (b), (c), and (j) of*  
33 *Section 2041, leading to the release of identifying information.*

34 *(c) An Internet user may bring a civil action against an Internet*  
35 *service provider or community host that willfully or intentionally*  
36 *fails to comply with this chapter for damages caused by its release*  
37 *of identifying information. A civil action under this section may not*  
38 *be commenced later than one year after the date upon which the*  
39 *claimant has discovered the violation. The court may award the*  
40 *following to the Internet user:*

1 (1) Actual attorneys' fees and other litigation costs incurred.

2 (2) Actual damages, including economic loss.

3 (3) Emotional damages.

4 (4) Statutory damages, described as follows:

5 (A) Minimum statutory damages of one hundred fifty dollars  
6 (\$150) per day shall be imposed for each day the Internet service  
7 provider or community host is delayed, after 10 days from  
8 receiving the subpoena, in providing notice to the Internet user, in  
9 violation of subdivision (d) of Section 2041.

10 (B) Minimum statutory damages of five hundred dollars (\$500)  
11 shall be imposed on the Internet service provider or community  
12 host for releasing Identifying Information when a written  
13 objection, motion to quash, or motion for a protective order is  
14 pending, in violation of subdivision (e) of Section 2041.

15 (d) For a repeat violation of this chapter by any party, the  
16 following shall be imposed:

17 (1) Minimum additional statutory damages of two thousand  
18 five hundred dollars (\$2,500) for a violation of subdivision (b).

19 (2) Minimum additional statutory damages of five hundred  
20 dollars (\$500) for a violation of subdivision (c).

21 (e) A court may award to the Internet user any other relief that  
22 the court deems appropriate.

23 2043. The following defenses to an action for damages  
24 pursuant to this chapter may apply:

25 (a) For the subpoenaing party, ~~a good faith attempt by that~~  
26 ~~party compliance by that party with subdivisions (a) to (c),~~  
27 ~~inclusive, of Section 2041.~~ to provide notice to the Internet service  
28 provider or community host.

29 (b) For the Internet service provider or community host:

30 (1) A good faith attempt to provide notice to the Internet user  
31 by complying with the notification procedures in subdivisions (e)  
32 (d) and ~~(h)~~ (j) of Section 2041.

33 (2) A good faith reliance upon the notices provided by the  
34 subpoenaing party.

35 (3) A reliance upon the lack of notice by the Internet user or  
36 other interested parties, before the date on which disclosure is due,  
37 that a written objection, motion to quash, or motion for protective  
38 order has been filed with the court.

39 (4) After receiving notice of the subpoena from the Internet  
40 service provider or community host, the Internet user submits a

1 signed letter to the Internet service provider or community host,  
2 consenting to the release of his or her identifying information.  
3 2044. Any federal or other state law that provides greater  
4 protection of an Internet user's identity may supersede application  
5 of this chapter in any particular case.

6 \_\_\_\_\_

7 CORRECTIONS

8 **Text — Pages 4 and 8.**

9 \_\_\_\_\_

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